economy these days there are many jobs available. I would think he should be paid at least RM300 p.m. But in calculating the earnings for this post-trial period I think I would have to take into account that he will be unable to work for probably 4 months since he would have to undergo several surgeries and he would need time to recuperate.

I would allow the loss of earnings at RM88,100 as shown below -

1.	Pre-trial loss for 60 months (6 May 1989 to 31 May 1994) at RM650 p.m.	RM40,000
2.	Post-trial loss at RM650 p.m. for 4 months while undergoing surgery and recuperation	RM 3,900
3.	Post-trial loss at RM350 p.m. for 16 years less 64 months i.e. 128 months	RM44,200
	Total	RM88,100

The total amount of damages awarded on a 100% liability comes to RM261,117. The plaintiff is awarded 75% of the amount with costs. Interest on the special damages will be at 4% p.a. from date of accident to date of judgment; on general damages at 8% from service of writ (25 October 1989) till date of judgment; and on the judgment at 8% from date of judgment to date of satisfaction.

RE: HONG KIM SIME; *EX PARTE*: MALAYAN BANKING BERHAD

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[BANKRUPTCY PETITION NO. 140 OF 1993]
11 JULY 1994

BANKRUPTCY: Creditor's petition opposed - Technical objections - Allegation that affidavit verifying petition defective - Affidavit attested by Justice of the Peace contrary to s. 128 of the Bankruptcy Act 1967 - Whether a Justice of the Peace is legally competent to attest affidavit - Bankruptcy notice and creditor's petition bearing different execution numbers - By r. 9(3) of the Bankruptcy Rules 1969 all proceedings of same matter to bear the same number - Whether any breach of statutory requirement - Consideration of Rule 30 Schedule C of the Bankruptcy Act 1967 - Section 4(1) of the Justices of the Peace Ordinance 1961 - Regulation 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 - Section 11 of the Courts of Judicature Act 1964 - Sections 99(1) & (2) of the Subordinate Courts Act 1948.

STATUTORY INTERPRETATION: Bankruptcy Act 1967, s. 128 - Whether a Justice of the Peace is legally competent to attest affidavit verifying creditor's petition - Whether a Justice of the Peace can be considered a "Magistrate" authorised to administer oaths within the meaning of s. 128(a).

WORDS & PHRASES: Interpretation Act 1948 and 1967 - "Magistrate".

The judgment debtor opposed the petition in the present case and two other petitions No. T-29-148-93 and No. T-29-149-93 on the ground that the affidavit verifying petition was irregular, defective and *ex facie void ab initio* thereby rendering the creditor's petition a nullity as the affidavit was attested to by a Justice of the Peace (JP) who, the judgment debtor contended, was not a person authorised to administer oaths in the High Court nor a Magistrate as required by s. 128 of the Bankruptcy Act 1967 (the Act). The judgment debtor also objected to the petition on the basis that the bankruptcy notice and the creditor's petition bore different execution numbers contrary to r. 9(3) of the Bankruptcy Rules 1969 which provides for all proceedings of the same matter to bear the same number.

Held:

[1] An affidavit sworn in Malaysia or Singapore must be affirmed or sworn before a person

authorized to administer oaths in the High Court or a Magistrate. The people who are authorised to administer oaths in the High Court are the Registrars of the High Court including deputies and assistants and this is provided for in s. 11 of the Courts of Judicature Act 1964; a JP was obviously not one of them. The specific and exhaustive categorisation in s. 128 of the Act of the persons qualified to take affidavits meant that only those specified persons and no other could take affidavits for use in bankruptcy proceedings unless rules made under the Act otherwise provided. A JP was specifically allowed to take affidavits if the affidavit was to be taken **outside** Malaysia or Singapore. Section 128 made it clear that a JP was not a person authorised to administer oaths in the High Court unless a JP could come within the definition of "Magistrate".

[2] The word "Magistrate is not defined by the Act. The Interpretation Acts 1948 and 1967 defines the word to mean "a Magistrate appointed under any written law providing for the appointment of Magistrates". Magistrates, both first and second class, are appointed under the provisions of the Subordinate Courts Act 1948. In West Malaysia, a JP has power to exercise within the state for which he is appointed such powers not exceeding the powers of a second class Magistrate as may be conferred upon them by any written law (see s. 99(1) of the Subordinate Courts Act 1948). A JP of Sabah is governed by separate legislation. The Court was of the view that the deeming provision of s. 4(1) of the Justices of the Peace Ordinance and the specific provision of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, made it clear that a JP was to take affidavits as if he was a Magistrate of the second class. Since a JP was clothed with such power as if he was a second class Magistrate, he could equally be regarded as having been appointed a second class Magistrate. The Subordinate Courts Act 1948 contains provisions governing the appointment of a second class Magistrate and the word "Magistrate" has been used there generically and therefore admits of Magistrates of both classes. The Court was therefore of the view that a JP of Sabah could take affidavits for the purposes of bankruptcy proceedings because a JP was to be regarded as a Magistrate for the purposes of s. 128(a) of the Act.

[3] A bankruptcy petition was not grounded on the absence or presence of numbers or similar numbers but on an act of bankruptcy which, in this case, was clearly stated in the petition and which petition clearly adverted to the bankruptcy notice even though the petition and the notice bore different numbers. The practice of assigning separate numbers for a bankruptcy notice and thereafter for a bankruptcy petition founded on the said bankruptcy notice was the fault of the Court. Given what has been said, this was surely a case where non-compliance with the rule did not bring about any prejudice to any party. The petition could not be set aside on this ground. The debtor failed in his objections.

[Judgment debtor's opposition to the petitions dismissed with costs to be taxed].

Legislation referred to:
Bankruptcy Act 1967, s. 128 (a), (b), (c), (d), r. 30 Schedule C
Bankruptcy Rules 1969, r. 9(3)
Courts of Judicature Act 1964, s. 11
Interpretation Acts 1948 and 1967
Justices of the Peace Ordinance 1961, s. 4(1)
Subordinate Courts Act 1948, s. 99(1), (2)
Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, reg. 2

For the judgment debtor - P.K. Lim; M/s. P.K. Lim & Co.
For the judgment creditor - Samson Chin; M/s. Hiew & Chin

JUDGMENT

Ian H.C. Chin J:
The petition herein is opposed by the judgment debtor on two technical grounds, which are reduced into writing by Mr. P.K. Lim, Counsel for the judgment debtor, and which I reproduce verbatim, *viz*:

(a) that the said affidavit verifying the petition is irregular, defective and *ex-facie void ab initio* thereby rendering the creditor's petition a nullity and/or not maintainable in law as not being supported by a valid affidavit (hereinafter referred to as the "1st objection"); and
(b) that on the Court records, there exist a bankruptcy notice **without** a corresponding creditors' petition as the bankruptcy notice and the creditors' petition bear different execution numbers which do not match emanating from the same judgment (hereinafter referred to as "the 2nd objection").

The same objection against two other petitions, No. T-29-148-93 and No. T-29-149-93, were, at

the behest of the same Counsel for the parties, heard together. Arguments were heard on 4 July 1994.

(1) Affidavit before Justice of the Peace.

Mr. P.K. Lim argued that a JP is not legally competent under s. 128 of the Bankruptcy Act 1967, ("the Act"), to attest the affidavit of truth of statement in petition because, argued Mr. P.K. Lim, a Justice of the Peace ("JP") is neither "a person authorised to administer oaths in the High Court" nor "a Magistrate" as required by s. 128 of the Act. For ease of reference the said section is reproduced here, *viz*:

> 128. Subject to general rules made by the Minister, any affidavit may be used in a bankruptcy Court if it is sworn:
>
> (a) in Malaysia or in the Republic of Singapore before any person authorized to administer oaths in the High Court or any Magistrate; or
> (b) in England before any person authorized to administer oaths in Her Majesty's High Court of Justice, or in the Court of Chancery of the County Palatine of Lancaster, or before any Registrar of a Bankruptcy Court, or before any officer of a Bankruptcy Court authorized in writing in that behalf by the Judge of the Court; or
> (c) in Scotland or in the Northern Ireland before a Judge, Ordinary Magistrate or Justice of the Peace; or
> (d) in any other place before a Magistrate or Justice of the Peace or other person qualified to administer oaths in that place who is certified to be a Magistrate or Justice of the Peace or qualified as aforesaid by a Consul or person performing consular functions on behalf of the Government of Malaysia or by a notary public.

The provision just referred to is clear and unambiguous and an affidavit, sworn in Malaysia or Singapore, must be affirmed or sworn before a person authorized to administer oaths in the High Court or a Magistrate. The people who are authorised to administer oaths in the High Court are the Registrars of the High Court, including deputies and assistants, and this is provided for in s. 11 of the Courts of Judicature Act 1964; a JP is obviously not one of them. The specific and exhaustive categorisation, in s. 128 of the Act, of the persons qualified to take affidavits means that only those specified persons and no other can take affidavit for use in bankruptcy proceedings unless rules made under the Act otherwise provide. A JP is specifically allowed to take affidavit if the affidavit is to be taken outside Malaysia or outside Singapore (see s. 128(d) of the Act). Section 128 of the Act, in specifically allowing for a JP outside of Malaysia and Singapore to take an affidavit and in omitting JP from the category of person allowed to take affidavit in Malaysia and Singapore make it clear that a JP is not a person authorised to administer oaths in the High Court unless a JP can come within the definition of "Magistrate". The only exception to the authorised category is found in r. 30 of Schedule C of the Act which provides that:

> 30. For the purpose of any or his duties in relation to proofs the official assignee may administer oaths and take affidavits.

The just cited rule allows the official assignee to take affidavit and is thus an exception, in fact, the only exception I can find, to the provision in s. 128(a) of the Act which reinforces my conclusion that the wordings of s. 128 of the Act are clear enough and, in so far as the taking of affidavit in Malaysia or Singapore is concerned, do not admit a JP to be a person authorised to administer oaths in the High Court. Thus far, I have only considered the question of whether a JP is a person authorised to administer oaths in the High Court and which I find in the negative. Mr. Samson Chin, Counsel for the creditors, referred to various enactments, which I will now advert to, and argued that a JP is allowed to take affidavit for bankruptcy proceedings, presumably, because he did not say so in so many words, because a JP can be considered a Magistrate within the meaning of s. 128(a) of the Act. He cited s. 4(1) of the Justices of the Peace Ordinance 1961, which says that:

> Every Justice of the Peace shall be authorised and is hereby required to administer oaths and affirmations, take and receive statutory declarations and attest signatures under any written law or when otherwise required to do so as though such Justice of the Peace were a Magistrate.

and he argued that that section allows a JP to take affidavit for the purposes of the bankruptcy proceedings. It was also argued by Mr. Samson Chin that s. 99(2) of the Subordinate Courts Act 1948, and the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, have the result of enabling a JP to

take affidavit for the purposes of bankruptcy proceedings, both of which are reproduced here:

Subordinate Courts Act 1948, s. 99(2):

> Justices of the Peace in Sabah shall have and shall exercise and perform such powers and duties as may be conferred or imposed upon them by any written law. They shall also have such other powers and duties as the Minister may by regulations confer or impose upon them and the Minister may confer or impose the said powers and duties upon all or any of the Justices of the Peace.

Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990:

> 2. Every Justice of the Peace shall be authorised and is required:
>
> (a) to administer oaths and affirmations;
> (b) to make and receive statutory declarations; and
> (c) to attest signatures,
>
> under any written law or when otherwise required to do so as though such Justice of the Peace were a second class Magistrate.

The issue, therefore, is whether a JP can be considered a "Magistrate" authorised to administer oaths within the meaning of s. 128(a) of the Act. The word "Magistrate" is not defined by the Act. The Interpretation Acts 1948 and 1967, defines the word to mean "a Magistrate appointed under any written law providing for the appointment of Magistrates". Magistrates, both first and second class, are appointed under the provisions of the Subordinate Courts Act 1948. In West Malaysia, a JP has power to exercise within the State for which he is appointed such powers not exceeding the powers of a second class Magistrate as may be conferred upon them by any written law. See s. 99(1) of the Subordinate Courts Act 1948. A JP of Sabah is governed by separate legislations and these are the Justices of the Peace Ordinance 1961, s. 99(2) of the Subordinate Courts Act 1948 and the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, all of which I have already quoted, *supra*. Concerning myself with the position of a JP of Sabah, I am of the view that the deeming provision of s. 4(1) of the Justices of the Peace Ordinance and the specific provision of the said Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, make it clear that a JP is to take affidavit as if he is a Magistrate of the second class. Since a JP is clothed with such power as if he is a second class Magistrate, he could equally be regarded as having been appointed a second class Magistrate. The Subordinate Courts Act 1948, contains provisions governing the appointment of a second class Magistrate and the word "Magistrate" has been used there generically and therefore admits of Magistrates of both classes. Since the Act was silent as to the meaning of the word "Magistrate", resort has to be had to the Interpretation Acts 1948 and 1967 and the later Acts advert to the Subordinate Courts Ordinance 1948, for its definition of Magistrate and hence the word "Magistrate" in s. 128(a) of the Act includes a second class Magistrate and, for the reasons I have stated, this in turn includes a JP since a JP has been deemed to be a second class Magistrate. I am therefore of the view that a JP of Sabah can take affidavits for the purposes of bankruptcy proceedings because a JP is to be regarded as a Magistrate for the purposes of s. 128(a) of the Act. I will now turn to the second objection.

(2) Proceedings Numbers.

The proceedings herein are intituled in the following manner:

> In Bankruptcy Notice No. T(29) 39 of 1993
> Bankruptcy Petition No. T(29) 140 of 1993
>
> Re: Hong Kim Sime (NRIC H0087713)
> - The judgment debtor
>
> *Ex-parte*: Malayan Banking Berhad
> - The petitioning creditors.

Mr. P.K. Lim referred the Court to r. 9(3) of the Bankruptcy Rules 1969, which provides for all proceedings of the same matter to bear the same number, and argued that there is a breach of the statutory requirement and that this had resulted in "a hanging petition not supported by a bankruptcy notice bearing the same distinctive number as the creditors' petition". He argued that the petition herein is a nullity. To that I say we must not lose sight of the law that a bankruptcy petition is grounded not on the absence or presence of numbers or similar numbers but on an act of bankruptcy which, in this case, is clearly stated in the petition and which petition clearly adverts to the bankruptcy notice even though the petition and the notice bear different numbers. The practice of assigning separate numbers for a bankruptcy notice and thereafter for a bankruptcy petition founded on the said bankruptcy notice was the fault of the Court. Given what I have said, this is surely a case

where non-compliance with the rule did not bring about any prejudice to any party. The petition cannot be set aside on this ground. The debtor fails in his objections.

The opposition of the debtor to the petition is dismissed with costs to be taxed. Similarly, the oppositions of the debtors of the said two other petitions *(supra)* are also dismissed with costs to be taxed.

RE: KOH THONG KUANG; *EX PARTE*: UNITED MALAYAN BANKING CORPORATION BERHAD

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[BANKRUPTCY NO. D2-29-7512-92]
27 APRIL 1994

BANKRUPTCY: Appeal - Application to set aside bankruptcy notice dismissed by SAR - Application based on affidavit of judgment debtor without notice of motion filed pursuant to r. 18 of the Bankruptcy Rules 1969 - Whether Court had power to entertain application - Service of bankruptcy notice by substituted service - Contention that bankruptcy notice not posted at judgment debtor's last known address - Contention that judgment debtor residing out of the country at material time of service - Whether service bad in law - Whether judgment debtor falls within categories of s.3(3) of the Bankruptcy Act 1967.

This was an appeal against the decision of the learned Senior Assistant Registrar (SAR) dismissing the judgment debtor's application to set aside the bankruptcy notice dated 22 December 1992 on the ground that service of it by way of substituted service was bad in law.

The bankruptcy notice was served by substituted service pursuant to order of Court dated 9 February 1993. Copies of the bankruptcy notice and the Court order were posted at the judgment debtor's last known address at 146, Jalan Maarof, Bangsar, 59000 Kuala Lumpur and notice of the bankruptcy notice was published in the Malay Mail on 29 March 1993. On 9 April 1993 the judgment debtor affirmed and filed his affidavit to set aside the bankruptcy notice. The judgment debtor contended that 146, Jalan Maarof, Bangsar, Kuala Lumpur was not his last known address which he claimed the judgment creditor was aware of from their attempts to serve a bankruptcy notice on him at 145, Jalan Maarof, Bangsar in previous bankruptcy proceedings. The judgment debtor further contended that when the bankruptcy notice and order of Court were posted at 146, Jalan Maarof, Bangsar he was residing at 15, Bolton Street, London W1, England which the petitioner was apparently also aware of from the judgment debtor's previous notice of intention to oppose the creditor's petition and his present affidavit in support of his application. Furthermore, the judgment debtor had another address in London which was declared in an affidavit related to a civil suit where he was a defendant.